IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

NOTICE OF MOTION NO.4022 OF 2007
IN
SUIT NO.2985 OF 2007

Marigold Constructions Pvt.Ltd. ...Plaintiff.
Vs.
Vasant Ramesh Gore & Ors. ...Defendants.

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Mr. P.K. Samdani, Senior Advocate with Mr.Vatsal Thakordas i/b. M/s. Kishore Thakordas & Co. for the Plaintiff.
Mr.Shailesh Shah with Ms. Sangita R. Gudhka for Defendant No.1.
Mr. A.Y. Bookwala, Senior Advocate with Ms.Nina Kapadia i/b. M/s. Pandya Gandhi & Co. for Defendant No.6.

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CORAM :DR.D.Y.CHANDRACHUD, J.
November 29, 2007.

P.C.:

This is a motion by the Plaintiff in a suit for specific performance of an agreement dated 11th February 2003 as modified by a supplementary agreement dated 29th March 2003 entered into between the Plaintiff and Defendant Nos.1 to 5. By consent, since pleadings are complete, the motion has been taken up on Board for hearing and final disposal.

2. The subject matter of the suit is a plot of land situated at Khar. By the first agreement that was arrived at on 11th February 2003 between the Plaintiff and Defendant Nos.1 to 5, the latter as the owner, granted to the Plaintiff, development and sale rights in respect of the aforesaid land admeasuring 666.50 sq. mtrs. bearing Plot No.82 of TPS III at and for a consideration of Rs. 4.90 crores. An amount of Rs.30 lakhs was to be paid immediately on the execution of the agreement, while the balance of Rs. 3.30 crores was liable to be paid on the owner making out a marketable title to the property and placing the developer in possession. Clause 13 of the agreement spelt out that parties would be entitled to specific performance of the agreement after the payment of the second installment of Rs. 3.30 crores.

3. On 29th March 2003, a supplementary agreement was entered into between the parties. The supplementary agreement records that the Plaintiff had after issuing two cheques in the

aggregate sum of Rs.30 lakhs, issued stop payment instructions upon a public notice of objections raised on behalf of one Vinayak Mayekar. The supplementary agreement recorded that the earnest money of Rs.30 lakhs that was to be paid under Clause 2(a) of the agreement dated 11th February 2003 would be paid as follows :

-(i) An amount of Rs. 11.65 lakhs was to be paid by the Plaintiff in favour of the Abhyudaya Co-operative Bank Ltd. in satisfaction of its claims against one of the owners; (ii) A payment of Rs. 6.35 lakhs was to be issued simultaneously with the payment to the Bank. Clause 3(c) of the supplementary agreement spelt out the manner in which the balance of Rs.12 lakhs comprised of the earnest money deposit of Rs.30 lakhs was to be paid. Clause 3(c) of the agreement provided as follows:

> "The balance amount of Rs.12,00,000/- (Rupees Twelve Lacs only) shall be paid by the developers to the Owners 30 days from the date of these Presents, to enable the Developer to give Public Notice to invite claim, if any, in respect of the Property the subject matter of the above Agreement. On expiry of the said Thirty days of and from these Presents the Developers shall pay a sum of Rs.12,00,000/- (Rupees Twelve Lacs only) to the Owners, by Pay Order favouring Mr. Vasant Gore, provided that

there is no claim after the issue of the Public Notice from any person whomsoever in respect of the property described in the Schedule hereunder written. It is also agreed that the Developer shall not withhold payment of the said sum of Rs.12,00,000/- (Rupees Twelve Lacs only) under 3(c) herein on the ground of any claim being received from Mr. Vinayak Mayekar and/or the heirs of Subodh Ramkrishna Gore listed at Sr.No. 6 to 8 on page no.5 of the Agreement dated 11.2.2003, it being the understanding that simultaneously against the payment of any further amounts under the Agreement dated 11.2.2003, the Owners will deal with and settle the claim of Mr. Vinayak Mayekar if any tenable in Law and the heirs of Late Subodh Ramkrishna Gore."

4. After the execution of the supplementary agreement, a public notice was issued on 31st March 2003. Four objections were received which were in turn, forwarded by the Advocate of the Plaintiff to the owner's Advocate. At this stage, it is material to note that Clause 3(c) of the supplementary agreement specifically spelt out that objections from Vinayak Mayekar or the heirs of Subodh Ramkrishna Gore shall not be a ground for the developer withholding the payment of a sum of Rs.12 lakhs, it being the understanding of the parties that it was for the owner to deal with and settle those claims. The

Advocate for the Plaintiff, forwarded the objections received under cover of a letter dated 25th April 2003. Of the four objections, two were of the heirs of Subodh Ramkrishna Gore, while the third was of Vinayak Mayekar which was agreed upon by the parties as not furnishing a ground for withholding the payment of Rs.12 lakhs. The final objection was of the heirs of one Mainal Ramkrishna Gore which would be dealt with in a subsequent part of this order.

5. Between 25th April 2003 when the Plaintiff' s Advocate addressed the aforesaid letter, and 2007 nothing further happened in the matter. A public notice was issued on 8th March 2007 for a proposed sale of the property upon which the Plaintiff addressed a letter on 13th March 2007 to the Advocate for the purchaser. In the letter, while recording its objection to the sale, the Plaintiff stated thus:

> "That in the circumstances, you are hereby requested to appraise your client that the said owner has no right to Sale the said property without clearing our dues and outstanding payment due to them and if, despite all these facts, if, your client choose to do so, he shall be doing so at his own responsibility as to the costs and consequences, which please ask your client to note." (emphasis supplied)

On 28th March 2007, a Deed of Conveyance has been entered into between Defendant Nos.1 to 5 and Defendant No.6.

6. On behalf of the Plaintiff, it has been submitted that there was a final and concluded agreement between the parties. Under clause 3(c) of the supplementary agreement, the Plaintiff is entitled to withhold the payment of the balance of the amount of Rs.12 lakhs towards the earnest money deposit in the event that a claim or objection was received in pursuance of the public notice, save and except for the claims of certain persons which were to be ignored. The grievance of the Plaintiff is that despite its letter dated 25th April 2003, the owner has done nothing thereafter and a conveyance was executed with the Sixth Defendant.

7. On the other hand, it has been submitted on behalf of the Defendants that parties were conscious of the fact that there were various outstanding claims of persons claiming an interest in the

property and that is why it was contemplated that a portion of the earnest money deposit would be withheld until all claims were settled. Parties contemplated that by the first agreement, the owner was entitled to specific performance only upon payment of the second installment. Moreover, it was urged that the circumstances of the case would show that prima facie, the Plaintiff was not ready and willing to perform the contract which is evidenced by two circumstances, namely, the failure of the Plaintiff to honour the cheque in the amount of Rs.30 lakhs which was towards the earnest money deposit and the failure to pursue any action whatsoever between the years 2003 and 2007 when the suit was instituted. Finally, it was urged that by the letter of the Plaintiff dated 13th March 2007, there was a clear representation that the Sixth Defendant would not be entitled to purchase the property without clearing the dues of the Plaintiff and this letter would prima facie show that the Plaintiff only sought a refund of the amount which has been paid.

8. On behalf of the purchaser, the Sixth Defendant, it has

been submitted that the claim of the Plaintiff admittedly, in the earlier agreement, was only to the extent of a 2/3rd undivided share in the property which belongs to Defendant Nos.1 to 5. The Sixth Defendant, on the contrary, has a Deed of Conveyance which covers the entire interest in the property.

9. While considering these submissions, it must be noted, at the outset, that Ramkrishna (who died intestate in 1940) had three sons. Defendant Nos.1 to 5 are the heirs of Ramesh, who is one of the three sons. The second son Sushilchandra is alleged to have bequeathed his share in the property to the First Defendant and it is common ground that Defendant Nos.1 to 5 had an undivided 2/3rd share in the property. The agreement that was entered into on 11th February 2003 was in respect of the undivided 2/3rd share of Defendant Nos.1 to 5. Now it is an admitted position that the cheques which were issued towards payment of the earnest money deposit amounting to Rs.30 lakhs which was due to be effected under clause 2(a) of the agreement were not honoured on presentation. According

to the Plaintiff, payment was stopped in view of the objections which were received to the agreement to sell. Be that as it may, a supplementary agreement was then entered into between the parties on 29th March 2003. An amount of Rs. 11.65 lakhs was to be paid over to the Abhyudaya Co-operative Bank Ltd. and Rs. 6.35 lakhs to Defendant Nos.1 to 5, this being a portion of the earnest money of Rs.30 lakhs. Clause 3(c) of the supplementary agreement contemplated that a public notice for inviting claims should be issued and the balance of Rs.12 lakhs would be paid only if there was no claim or objection. However, certain specific claims were not to be taken into reckoning. These claims were the claims of one Vinayak Mayekar and the heirs of Subodh Ramkrishna Gore. The question as to whether the Plaintiff was ready and willing to perform the contract will have to be prima facie assessed and evaluated with reference to the conduct of the Plaintiff after the claims were invited. In a letter dated 25th April 2003, the Plaintiff adverted to four claims. Three of the aforesaid claims, namely those referred to in sub-paragraphs (a) and (c) of the letter, were of the heirs of Subodh Gore and in sub-

paragraph (d) were of Vinayak Mayekar each of which had to be ignored. One of the claims at sub-paragraph (b) was of the heirs of Mainal . Now, in so far as Mainal is concerned, the recitals in the main agreement between the parties dated 11th February 2003 provided that she had no right, title or interest. The contention of the Plaintiff is that the claim, if any, of Mainal was not referred to in the supplementary agreement as being required to be excluded and the reference to her in the earlier agreement was only to be found in the recitals. Be that as it may, it is significant to note that between 25th April 2003 and 13th March 2007, there was not a single letter or step by the Plaintiff indicative of an intention to pursue the agreement. Finally on 13th March 2007, when the Plaintiff came across a public notice issued by the Sixth Defendant who was proposing to purchase the property, all that the Plaintiff stated was that the "owner has no right to sell the property without clearing" the dues of the Plaintiff "and outstanding payment due to them". The letter of the Plaintiff dated 13th March 2007 prima facie shows that when placed on notice, the Plaintiff only sought a refund of the money which had

been paid. Parties were conscious that they had entered into an agreement on 11th February 2003 and Defendant Nos.1 to 5 were representing only an undivided 2/3rd share in the suit property. The supplementary agreement was executed in the background of the claims and objections which had been received. Parties contemplated that further claims were likely to be received. The principal agreement dated 11th February 2003 spells out in clause 13, the intention of the parties that specific performance would be conditional on the payment of the second installment of Rs. 3.30 crores. It is in this background that the parties contemplated that the payment of even the entire earnest money will be deferred until all claims and objections were dealt with. The Plaintiff on his part was prima facie not ready and willing to perform the terms of the agreement as would emerge from its letter dated 13th March 2007.

10. In these circumstances, no case has been made out for the grant of injunctive relief in the Notice of Motion. The Notice of Motion shall accordingly stand dismissed.

11. On the request of Counsel appearing on behalf of the Plaintiff, the ad-interim order dated 2nd November 2007 shall remain in operation for a period of four weeks from today so as to enable the Plaintiff to avail of its remedies in appeal.

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